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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 243

GEORGE E. SHIBLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A 1–14; 9 R. 3–14) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1956 (Pet. App. B 15; 9 R. 15), and a petition for rehearing was denied on May 9, 1956 (9 R. 16). On May 28, 1956, by order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to July 7, 1956, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] The record is in 9 volumes and is not paginated consecutively throughout.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the verdict.

2. Whether, in the circumstances, the court's refusal to permit petitioner to introduce additional evidence as to his alleged lack of motive constituted prejudicial error.

3. Whether there was error in the court's charge to the jury.

4. Whether the court's denial of petitioner's motion for a new trial upon the basis of allegedly newly discovered evidence constituted an abuse of discretion.

5. Whether petitioner's three-year sentence under the conspiracy count was illegal.

6. Whether 18 U. S. C. 13 is unconstitutional because by incorporation it makes state criminal laws applicable in areas which are situated within a state but are under federal jurisdiction.

STATUTES AND RULE INVOLVED

The statutes (18 U. S. C. 1, 7, 13, 371, 641; California Penal Code, Secs. 459, 460, 461; and Rule 33, F. R. Crim. P.) appear in the Appendix, *infra,* pp. 23–25.

STATEMENT

After a jury trial on a four-count indictment, petitioner was convicted on two counts which charged him and co-defendant Charles R. Thompson with (1) receiving and converting property of the United States, *i. e.,* a copy of a transcript of proceedings of a United States Marine Corps Court of Inquiry, knowing it to have been stolen from the United States,

and (2) conspiracy to commit burglary in a building reserved for use of the United States, and to steal and receive and convert property of the United States (counts 3 and 4, 1 R. 4–5, 30).[2] Counts 3 and 4 alleged that the copy of the transcript had "a value of over $100.00" (1. R. 4–5), but under count 3 the jury found the value of the property to be "less than $100" (7 R. 574). Petitioner was sentenced to concurrent terms of imprisonment of one year on count 3 and three years on count 4 (1 R. 180). On appeal, the judgment of conviction was affirmed (Pet. App. B. 15; 9 R. 15).[3]

The transcript in question covered the proceedings of a Special Court of Inquiry which was convened on December 3, 1952, at the Marine Corps Air Station at El Toro, California, to investigate alleged administrative irregularities in the Service Squadron of Aircraft, Marine Forces, Pacific. The complaint which led to the inquiry was made by petitioner following court-martial proceedings at the Station in which petitioner, as a civilian counsel, represented a serviceman-

[2] Counts 1 and 2 charged petitioner with aiding and abetting codefendant Thompson to enter the Marine Air Station with intent to commit larceny and, together with Thompson, with stealing the transcript. On the government's motion prior to trial, count 2 of the indictment was dismissed. The jury made no finding on count 1 (1 R. 2–3, 84, 90, 91). R. 753, which states that the jury found petitioner guilty on count 2, appears to be a typographical error.

[3] Co-defendant Thompson pleaded guilty to count 1, which charged him as a principal in the entering of the Air Station with intent to commit larceny, and to the conspiracy charge in count 4 (1 R. 2; 4 R. 3–4). Upon the government's motion, counts 2 and 3 against Thompson were dismissed (4 R. 4–5).

defendant, one Master Sergeant Bennette (4 R. 51–52; 5 R. 219, 290–291). During the Court of Inquiry's session from December 3 through December 12, 1952, petitioner testified on five different days (5 R. 220) and was held in contempt 13 times (5 R. 221).[4] The transcript of the full proceedings, and copies thereof, were completed on December 19, 1952 (5 R. 201). One copy was placed in the filing cabinet in the legal office at the Air Station (5 R. 199, 201–202). The following morning, this copy was missing (5 R. 203–204). The charges involved here arose from this taking.

The evidence adduced at the trial concerning the circumstances of the taking of the transcript may be summarized as follows:

While the Special Court of Inquiry was in progress, a marine who had been petitioner's escort during the Bennette court-martial, Corporal Robert Huckenphaler, advised petitioner that he would be glad to assist petitioner in any way he could with respect to the Court of Inquiry. Petitioner advised him that a man named "Rusty" might contact him (4 R. 57–59). Shortly thereafter, petitioner asked co-defendant "Rusty" Thompson to contact Huckenphaler. Thompson did so. At that time, Huckenphaler stated to Thompson that he would be glad to help petitioner

[4] Subsequently, petitioner was indicted on the contempt charges. He was acquitted on some counts; the jury did not bring in a verdict on the remaining counts. Petitioner was subsequently tried and convicted on contempt charges arising out of that trial and sentenced to thirty days. This judgment of conviction was affirmed on appeal but the case was remanded for reconsideration of the sentence, in view of the sentence here (*Shibley* v. *United States*, No. 14,464, decided June 18, 1956 (C. A. 9), not yet reported).

in any way he could, since he did not feel that petitioner had been treated fairly; that he was working in the legal office of the Air Station; that he had access to certain records, copies of which he might be able to obtain for petitioner; and that he was working on the transcript of proceedings of the Court of Inquiry (4 R. 59–60, 64–67, 116–118). Thompson told Huckenphaler that he was working for petitioner, and that The Judge Advocate General, certain Senators, and Drew Pearson were interested in the outcome of the Court of Inquiry (4 R. 65, 91). At their next meeting, the two discussed the transcript of the Court of Inquiry proceedings (4 R. 69, 119–120). On or about December 12, 1952, Huckenphaler advised Thompson that the transcript would be ready for distribution in about a week; told Thompson that a copy would be located in a bottom drawer of a filing cabinet in the central office; and advised him of the location of the central office, the plan of the building and the location of the necessary keys (4 R. 71–74, 120–123). During all of this time, Thompson kept petitioner informed as to the details of his conversations with Huckenphaler (4 R. 118, 120, 124).

On December 19, 1952, Thompson told petitioner that the records would be available that night (4 R. 125–126). When petitioner asked him if the transcript "could be gotten", Thompson said "yes". Petitioner then asked him if he had "everything pretty well in mind" and told him not to forget to wear his gloves (4 R. 126). Thompson, dressed in a marine sergeant's uniform, went to Huckenphaler, who advised him that the liberty and identification

cards which Thompson showed him would get him into the Air Station (4 R. 75–76). Thereafter, Thompson successfully entered the Air Station and removed from the bottom of the filing cabinet a copy of the transcript covering the full proceedings of the Court of Inquiry (4 R. 128–129).

The following morning, on December 20, Thompson brought the copy of the transcript to petitioner at his home. Petitioner told him that he could not keep the transcript around the house, glanced through it, and told him that he would like a copy of it (4 R. 129, 5 R. 189). Thompson took the copy with him and had two photographic copies made.[5] The following day, he took the transcript, the photographic copies, and the negatives to petitioner (5 R. 173–175). Petitioner told Thompson to mail the negatives to him, so that he could have a legitimate excuse for having them. He also told Thompson to mail one copy to his attorney, Mr. Marshall in Los Angeles, and the original to Drew Pearson (5 R. 178, 6 R. 401). Petitioner advised the use of a Santa Ana return address, rather than Long Beach where he lived, since such a return address would suggest that the mail was sent by a marine (5 R. 193). The packages were wrapped in Christmas paper, covered with heavy paper, and Thompson and his roommate, Pat Fields, addressed and mailed them in accordance with petitioner's instructions (5 R. 179–181, 193, 236–237).

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[5] Thompson said that the photographing cost $200 which he obtained from petitioner's secretary on Monday, December 22 (5 R. 191–192). Petitioner's secretary denied that she ever gave the money to Thompson (5 R. 262). See further summary of her testimony, *infra*, p. 9.

After petitioner received the package addressed to him, Thompson went to his office. Petitioner cautioned him not to say anything, as he usually did because of his suspicion that his office was wired, and then picked up the conversation, expressing his surprise at receiving the negatives of the transcript. Thompson replied that he did not know where the negatives came from and that petitioner had more friends "over there" than he thought (6 R. 401–402).[6]

Fields, Thompson's roommate, testified that in December 1952 he was Drew Pearson's employee, and that he participated with Thompson in the addressing and mailing of the packages. He said that subsequently, when he saw petitioner on the street, he remarked to him in passing, "Those packages that you wanted mailed are in the mail". Petitioner replied, "Thank you", and told Fields to get out of town for a few weeks (5 R. 235, 240; 6 R. 371).[7]

Petitioner testified that he first met Thompson in October 1952 (5 R. 295), when the latter was em-

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[6] Except for the conversation between Huckenphaler and petitioner, the foregoing evidence, where it directly implicated petitioner, was provided solely by Thompson's testimony. But other parts of the foregoing testimony were corroborated by Huckenphaler (4 R. 58–76), by a girl who was Thompson's companion on one of his visits to Huckenphaler (5 R. 241–244), by a post office inspector (5 R. 224–227), and by the photographer and employee who made copies of the transcript (6 R. 378–399). When Thompson was first questioned by the police about the stolen documents, he said that petitioner had nothing to do with the stealing (5 R. 184).

[7] Fields testified that he addressed the package to petitioner under the name of "Shivley" (5 R. 238) but post office records show that petitioner's name was spelled correctly as "Shibley" (5 R. 228).

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ployed by Captain Worley's private detective agency, which petitioner used in connection with his legal work, and that Thompson visited his home frequently as an uninvited guest (6 R. 337). Petitioner said that when Huckenphaler talked to him and told him that he would like to help him, petitioner discouraged him, but Huckenphaler insisted and gave his name and address. Petitioner said that he thereafter asked Thompson to see Huckenphaler, and Thompson reported that his conversation with Huckenphaler netted nothing but "gossip" about petitioner's case (5 R. 297–303, 6 R. 336). Petitioner denied that he had ever retained Thompson in connection with the Court of Inquiry proceedings (5 R. 303–304), that he had ever asked Thompson to obtain a copy of those proceedings (5 R. 305), and that he even saw Thompson on December 19, 1952 (5 R. 305).

Petitioner said that on December 20, 1952, Thompson came to his home and showed him a copy of the transcript; that, when petitioner asked him where he had obtained it, he said that it was legal; that he (petitioner) refused to take it; and that thereafter he did not see that transcript (5 R. 306–307). He denied that he requested Thompson to make copies of it or that he or his secretary paid him to make copies (5 R. 307–308). He denied that he had the conversation with Fields to which Fields testified (6 R. 319–320).

Petitioner further testified that on December 24 he received a Christmas-wrapped package which contained negatives of the transcript (5 R. 308–309), and

that subsequently, through Captain Worley's office, he had copies made from the negatives and mailed them to another attorney who was representing him (5 R. 309). He said that he did not know, then or later, that the transcript covered by the negatives was stolen from the Air Station (6 R. 335).

Petitioner's secretary testified on his behalf that in January 1953 petitioner had copies of the transcript made from the negatives which he received by mail. She stated that the copies were made by Thompson through Captain Worley's office; that she paid Thompson for them by check, but charged the check to another case in the office; and that she first learned in February 1953 that the negatives covered stolen documents, when a corporal who had been questioned by the Office of Naval Intelligence told her and petitioner about it (6 R. 359–361, 365, 366–367).

ARGUMENT

1. There is no occasion for this Court to review, as urged by petitioner (Pet. 48–54), the concurrent findings of the courts below that the evidence was sufficient to support the verdict (*Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 588–590). Petitioner does not deny that his conviction was amply supported by the evidence if Thompson's testimony is taken into account. His argument, in substance, is that Thompson's testimony should be discounted because Thompson had once been confined in a mental institution and because that testimony

was not corroborated in every detail.[8] But the fact that Thompson's testimony is the only evidence which directly implicated petitioner certainly is no basis for reversal. The credibility of witnesses was a matter for the jury to determine under appropriate instructions. Such instructions were given, with a specific caution that the testimony of Thompson, an accomplice, should be carefully scrutinized (7 R. 471–472, 475, 477). Defense counsel cross-examined Thompson on his prior confinement for mental illness (5 R. 166–169) and this evidence was before the jury when it considered Thompson's credibility. Thompson's past mental illness did not affect his competency as a witness and he was properly allowed to testify. *District of Columbia* v. *Armes,* 107 U. S. 519; *N. Y. Evening Post* v. *Chaloner,* 265 Fed. 204 (C. A. 2).

2. During the trial, the court sustained the government's objection to certain questions addressed to Mr. Marshall, an attorney first retained by petitioner while the Court of Inquiry proceedings were in progress (5 R. 275–276). The defense offered to show that Mr. Marshall advised petitioner that "if proceedings were filed against him in the Federal Court for contempt of the Court of Inquiry that he would be entitled to a transcript of the proceedings" (5 R. 282–

[8] The discrepancies in the testimony of the government witnesses to which petitioner refers dealt with Thompson's negotiations with the photographer in making copies of the transcript. For example, Thompson testified that he paid the photographer on Monday, December 22, 1952, for the photographs of the transcript, whereas the photographer testified that he received the money on Sunday, December 21, just after he finished the job (5 R. 191, 6 R. 396, 399).

283). This line of inquiry was not permitted. However, Mr. Marshall was allowed to testify that on two occasions after December 10 (the first of these on December 16th or 17th) he visited the office of the United States Attorney and was given access to a portion of the testimony (5 R. 276–277).

Petitioner himself testified that on December 10, 1952, it was his opinion as a lawyer, based upon his research, that he had an absolute right not only to read, inspect and copy the full record of the proceedings of the Court of Inquiry, but that he was also entitled to be furnished, free of charge, a copy of the record. He testified that he had a conference with his attorney in which this matter was discussed (6 R. 316–317, 344). He also testified that he knew, prior to December 19, 1952, that his attorney, Mr. Marshall, had been permitted by the United States Attorney to inspect the Court of Inquiry transcript and that, until March 1953, he believed that the transcript which Mr. Marshall inspected was a full transcript, rather than only a portion of the transcript covering petitioner's testimony (6 R. 317–319).

The President of the Court of Inquiry testified that petitioner requested a copy of the transcript and that he informed petitioner that he would have to investigate the legality of providing him with a transcript before making a decision on the request (4 R. 52).

In its final instructions to the jury, the court said (7 R. 476):

> The transcript of the Court of Inquiry proceedings affecting the defendant Shibley, a copy of which defendant Shibley would eventually

> have been entitled to receive. However, you are not to conclude from the fact that the defendant Shibley would eventually be entitled to such record that he or anyone else would be entitled to unlawfully remove or conspire to remove said record from the Marine base. Motive or absence of motive is merely a circumstance for your consideration along with all the other facts and circumstances in the case.

The court then went on to charge that proof of motive was not an essential element of the crime, but that it was valuable evidence to be considered (7 R. 476–477).

Petitioner contends (Pet. 31–35) that the court's refusal to permit Mr. Marshall to testify that he advised petitioner that he had a right to the transcript prevented him from establishing lack of motive by independent evidence. But the offer of proof was not that Mr. Marshall told petitioner that he had an absolute right to the full transcript, but merely that petitioner would have a right to the transcript if contempt proceedings were instituted against him.[9] The important issue on motive, moreover, was not petitioner's rights as a matter of law but his belief as to his legal rights. When petitioner himself testified, he did not claim that he relied on Mr. Marshall's advice, but rather that he reached his conclusion from his own study of the law. The excluded testimony had thus only a remote bearing on the issue of lack of

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[9] Contempt proceedings were not commenced against petitioner until January 28, 1953. See *United States* v. *Shibley*, 112 Fed. Supp. 734, 738 (S. D. Cal.); the acts here involved were committed in December 1952.

motive, and was at most only cumulative on a matter as to which evidence was fully presented to the jury.

3. Petitioner endeavors (Pet. 35–41) to interpret the portion of the charge quoted above, *i. e.* that petitioner would eventually have been entitled to receive a copy of the "transcript of the Court of Inquiry proceedings affecting the defendant Shibley," as a direction to the jury that he would have been entitled to receive only the portion of the transcript relating to his own testimony.[10] It is argued that the court thus implied a motive to secure the *full* transcript illegally. Neither the precise language used, nor normal usage and understanding, support this over-refined contention. The words "affecting the defendant Shibley" described the Court of Inquiry proceedings in question, and that is all. The jury was thus told, in general terms, that petitioner would eventually have been entitled to receive a copy of the transcript affecting him. As the Court of Appeals stated, his position was adequately presented to the jury and, indeed, the charge may well have been more favorable to petitioner than was his right.

Navy regulations (32 C. F. R., section 701.2 (b)) provide that records of Navy Courts of Inquiry are confidential, and that the Secretary of the Navy *may*

[10] Petitioner had requested an instruction that the "transcript of the Court of Inquiry proceedings was a public record a copy of which the defendant Shibley would eventually have been entitled to receive" (7 R. 496–497). It is on the change of phraseology to "transcript of the Court of Inquiry proceedings affecting the defendant Shibley" that petitioner's argument is based. The argument on this aspect of the case was not held before the jury (see 7 R. 495–497).

make such records available to persons properly and directly concerned, whether or not litigation is involved. Courts of Inquiry are not court-martial proceedings, but are special, advisory, non-judicial inquiries of the executive branch of the government concerning administrative matters. Such proceedings are either closed or open depending on the convening authority. See 50 U. S. C. 731; 25 Op. Atty. Gen. 623; 8 Op. Atty. Gen. 223, 335; *United States* v. *Shibley*, 112 F. Supp. 734, at pp. 742–743. In this case, the proceedings were ordered closed. Until the contempt indictment was returned on January 28, 1953 (*United States* v. *Shibley*, 112 F. Supp. 734, 740), it is doubtful that petitioner was entitled by right to any part of the transcript. And, although petitioner states (Pet. 40, fn. 21) that the trial court in the *Shibley* contempt case ordered the government to make the complete copy of the transcript available to petitioner, the opinion in *United States* v. *Shibley*, 112 F. Supp. 734, 740, indicates only that the "proceedings before the Court of Inquiry on the dates on which the defendant appeared, and certain documents attached thereto" were tendered in the trial court in response to petitioner's motion for a bill of particulars.

4. Petitioner filed a motion for a new trial on the ground of newly discovered evidence (1 R. 123–126). Attached to the motion were affidavits stating that, although Miss Fuller (the "new" witness) had worked for the Shibleys during December 1952 and although defense counsel learned during the trial that she was in Thompson's company on the night of December 19,

1952 (the date of the commission of the acts in question), the defense was unaware until after the trial that she had any information material to the defense (1 R. 128–144).

Miss Fuller's affidavit dated January 14, 1954, states that, without petitioner's knowledge, she had been dating Thompson while she was living with the Shibleys; that she spent the evening and night of December 19, 1952, with Thompson; and that Thompson advised her that he was going to obtain some documents illegally but that he was protected since he could "always pin it on someone else". She also states that Thompson told her that, on obtaining the documents, he would get a "lot of money" from "big newspapers"; that, during the night, Thompson went out and returned with the papers; that, later the following day, while she was at petitioner's home, Thompson came to see petitioner, had an argument with him and left; that, still later, he told her that, when he showed the documents to petitioner, petitioner treated him like a criminal and booted him out of the house; and that afterwards Thompson "acted like he hated George [petitioner], like he wanted to get George in trouble"; and that Thompson made her promise that she would not tell petitioner anything about the stolen documents or that photographs of them had been made. She states that Thompson gave her the documents, photographs and negatives to keep in her home and told her that, if anyone discovered them, she could say petitioner gave them to her. She states that she had been questioned by the government on this matter, and that she told the government that

she would not testify against petitioner and that petitioner knew nothing about the documents (1 R. 145–156).

The government filed counter-affidavits stating that, when Miss Fuller was questioned in May 1953 by members of the Office of Naval Intelligence, she signed a statement declaring that in December 1952 she heard petitioner and Thompson talk about needing some papers from the El Toro Air Station; that, when she was with Thompson on the night of December 19, he told her that he was going to the Air Station to get papers which petitioner needed; and that, when Thompson arrived at petitioner's house the following day, he handed the papers to petitioner. The government affidavits also stated that in November 1953 Miss Fuller told Assistant United States Attorney Bowler that she absolutely refused to testify against petitioner and that, when she was warned about contempt proceedings, she replied that she was a minor and already in custody (1 R. 158, 160–177).

A later affidavit by Miss Fuller, dated January 22, 1954, stated that she spent the evening and night of December 19, 1952, with Thompson and that Thompson picked up some papers, but that she did not know that these papers had anything to do with petitioner. She expressly retracted as not "true" prior statements that she had heard an argument between petitioner and Thompson and that she had seen Thompson hand the papers to petitioner (8 R. 2–3).

Upon the basis of the affidavits and counter-affidavits, the trial court denied petitioner's motion (1 R.

178). Petitioner challenges this action as an abuse of discretion (Pet. 41–48).

As this Court observed in *United States v. Johnson,* 327 U. S. 106, where a trial judge who conducted the trial has considered the affidavits and counter-affidavits on a motion for a new trial grounded on newly discovered evidence, and has denied the application, it is not ordinarily the function of an appellate tribunal to review his findings. In the *Johnson* case, as in the instant one, an attempt was made, on a motion for a new trial, to impeach the credibility of a trial witness. This Court held (p. 111) that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *." We submit that no such circumstances exist here.

The evidence was not newly discovered after the trial. Huckenphaler testified that Thompson came to his home on the night of December 19 with a girl named Yvonne (4 R. 74). On Thompson's redirect examination, government counsel elicited information that the girl who accompanied him on December 19, 1952, was Yvonne Fuller, who was living at petitioner's home (5 R. 188–189). In cross-examining Thompson, defense counsel asked whether the young lady who was with Thompson before he stole the documents was a narcotics addict (5 R. 171–172). After the foregoing testimony was adduced, on Thompson's re-cross-examination, the following occurred (5 R. 195–196):

Q. Mr. Thompson, this lady whom you say you were with that night, the night of the 19th, that little girl was a little girl that had been paroled to Mrs. Shibley, the young lady sitting right here in front of me, by the Youth Authority of this State?

MR. BOWLER: That is objected to as calling for a conclusion of this witness.

THE COURT: I don't think that is proper, counsel. You must remember there is only one person on trial in this case now.

MR. BALL: That is correct. Let me say this: That little girl was working as a maid in that home.

THE COURT: Let us not discuss her.

MR. BALL: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

MR. BOWLER: You can't show it by this witness. You might be able to show it by other witnesses.

THE COURT: Is she here?

MR. BOWLER: She is available, your Honor, and we will have her here.

MR. BALL: I won't pursue the question then.

THE COURT: I think you are getting on dangerous ground, counsel.

* * * * *

Petitioner thus was aware that Miss Fuller, who was very well known to him, might have information about the night in question, and he could have interviewed her if he had chosen to do so.

Petitioner's assertion that the government concealed the exculpating testimony of an essential witness is not founded in fact. Miss Fuller's statements to the in-

vestigating officers implicated rather than exculpated petitioner, but the government did not choose to use her as a witness because of her expressed hostility and unwillingness to testify. Moreover, Miss Fuller's affidavit was "much less than enough to show any abuse of discretion in the denial of the motion." *United States* v. *Cordo,* 186 F. 2d 144, 148 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States,* 340 U. S. 952; cf. *Sharp* v. *United States,* 195 F. 2d 997, 998 (C. A. 6); see also Rule 33, F. R. Crim. P. At most it tended to impeach the credibility of Thompson and it was changed shortly after it was made.[11]

5. The conspiracy count on which petitioner was sentenced to three years' imprisonment charged a conspiracy between him and Thompson to commit (1) the felony of burglary as defined under California law and made applicable to lands reserved to the United

[11] The asserted conflict between the instant decision and the decision in *Griffin* v. *United States,* 336 U. S. 704, is not borne out by the facts. In *Griffin,* unlike this case, the evidence described in the motion was in fact new evidence, favorable to the defendant and known, but withheld, by the government. The other cases cited by petitioner (Pet. 41), except for *Benton* v. *United States,* 188 F. 2d 625 (C. A. D. C.), also involved what can be classified as new evidence, unlike that in the instant case. In *Benton* v. *United States,* involving alleged abuse of a minor, a new trial was granted to permit testimony by the victim's (a twelve year old girl's) mother which impeached the testimony of the victim whose sole evidence implicated the defendant. The mother's testimony was of central and critical importance and the "special factors" involved in the case were deemed to require a reopening (p. 627). The court also emphasized that the motion was filed within five days and might be granted under Rule 33, which is "broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence" (*ibid.*).

States by 18 U. S. C. 13 (*infra*, p. 23), and (2) to receive, conceal and convert property of the United States, knowing it to have been stolen in violation of 18 U. S. C. 641 (*supra*). The jury returned no verdict on the substantive charge of burglary contained in count 1, and found, as to the substantive receiving charge in count 3, that the value of the property was less than $100. Petitioner argues that, in view of the absence of verdict on the substantive burglary count, his conviction on the conspiracy count could have been only for conspiracy to commit the misdemeanor of receiving property of less than $100, with the result that the maximum punishment which could be imposed under 18 U. S. C. 371 would be one year for conspiracy to commit a misdemeanor.

The jury could have concluded, quite logically, that, while petitioner conspired with Thompson to have Thompson commit burglary to get the transcript, petitioner did not participate in the actual burglary, at which he was not present, to the degree that would make him an aider and abettor of the substantive crime. Cf. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619–620. Thompson's testimony that petitioner asked him if he had gloves and told him not to forget to wear them (4 R. 126) in itself would show that the conspiracy contemplated the burglary.

The offense under the substantive aider and abettor count (count 1) and the conspiracy count are separate and distinct, and are punishable by separate sentences. *Pinkerton* v. *United States*, 328 U. S. 640; 643–644; *United States* v. *Crowe*, 188 F. 2d 209 (C. A. 7); *Colosacco* v. *United States*, 196 F. 2d 165, 168;

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229 F. 2d 880 (C. A. 10). And in any event consistency in the jury's verdict is not required. Since the conspiracy on which petitioner was convicted was to commit a felony as well as a misdemeanor, the three year sentence was permissible.

6. Petitioner also challenges (Pet. 58–60) the constitutionality of 18 U. S. C. 13, insofar as it is involved in the conspiracy count, on the grounds that it unlawfully delegates federal legislative powers to the states, that it encroaches upon powers reserved to the states, and that it is too indefinite and vague. But all that 18 U. S. C. 13 does is to make applicable, by adoption and incorporation, state criminal laws which govern in the states in which federal enclaves are located. It has been consistently held that Congress, by such specific reference and adoption, may validly incorporate state laws into federal penal statutes. *Hemans* v. *United States,* 163 F. 2d 228 (C. A. 6), certiorari denied, 332 U. S. 801; *Hollister* v. *United States,* 145 Fed. 773, 778–779 (C. A. 8) (similar statute involved). And see *Franklin* v. *United States,* 216 U. S. 559, holding that a similar claim of unconstitutional delegation of legislative powers was so insubstantial as not to warrant exercise of the Court's appellate jurisdiction.[12]

[12] Since the California statute was in existence before the 1948 revision of the federal criminal laws (see note 2 of opinion below), the aspect of 18 U. S. C. 13 which adopts subsequently enacted state laws is not involved.

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CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

The pertinent portions of the statutes and rule involved are as follows:

18 U. S. C. 1:

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

* * * * *

18 U. S. C. 7:

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

* * * * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

* * * * *

18 U. S. C. 13 (Assimilative Crimes Statute):

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

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18 U. S. C. 371:

If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such disdemeanor.

18 U. S. C. 641:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Deering's California Penal Code

Sec. 459:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any

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underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

* * * * *

Sec. 460:

Every burglary of an inhabited dwelling-house or building committed in the night-time, and every burglary, whether in the daytime or night-time, commited by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

Sec. 461:

Burglary is punishable as follows:

1. Burglary in the first degree: by imprisonment in the State prison for not less than five years.

* * * * *

Rule 33, Federal Rules of Criminal Procedure:

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

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